TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 242

NASSAU SMELTING & REFINING WORKS, LTD.,
PETITIONER,

vs.

BRIGHTWOOD BRONZE FOUNDRY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 7, 1923

CERTIORARI AND RETURN FILED JUNE 30, 1923

(29,447)

(29,447)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 242

NASSAU SMELTING & REFINING WORKS, LTD., PETITIONER,

vs.

BRIGHTWOOD BRONZE FOUNDRY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 6, 1923

[fol. 1] **UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, OCTOBER TERM, 1921**

No. 1578

NASSAU SMELTING & REFINING WORKS, LTD., CREDITOR, APPELLANT,

v.

BRIGHTWOOD BRONZE FOUNDRY COMPANY, BANKRUPT, APPELLEE

Transcript of Record of District Court

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

No. 28216. In Bankruptcy

IN THE MATTER OF BRIGHTWOOD BRONZE FOUNDRY COMPANY, Bankrupt

CREDITORS' PETITION—Filed November 5, 1920, at 11 o'clock A. M.

To the Honorable James M. Morton, Jur., Judge of the District Court of the United States for the District of Massachusetts:

The petition of the Charles C. Lewis Company, a corporation duly organized by law and located in Springfield, Hampden County, Massachusetts, American Law & Manufacturing Company, a corporation duly organized by law and located in Springfield, Massachusetts, Bay State Crucible Company, a corporation duly organized by law and located in Taunton, Massachusetts, respectfully shows that Brightwood Bronze Foundry Company, a corporation duly organized by law [fol. 2] and located in Springfield, Massachusetts, has for the greater portion of six months next preceding the date of the filing of this petition, had its principal place of business [or resided, or had his domicile] at Springfield in the county of Hampden and State and district aforesaid, and owes debts to the amount of $1,000. That your petitioners are creditors of said Brightwood Bronze Foundry Company having provable claims amounting in the aggregate, in excess of securities held by them to the sum of $500. That the nature and amount of your petitioner's claims are as follows:

The Charles C. Lewis Company, merchandise sold and delivered	$90.42
American Law and Manufacturing Company, merchandise sold and delivered	$732.77
Bay State Crucible Company, merchandise sold and delivered	$1,075.06

And your petitioners further represent that said Brightwood Bronze Foundry Company is insolvent, and that within four months

next preceding the date of this petition the said Brightwood Bronze Foundry Company committed an act of bankruptcy, in that it did heretofore, to wit, on the eighth day of September, 1920, made a general assignment for the benefit of its creditors, to one Henry Lasker of Springfield, Massachusetts.

Wherefore, your petitioners pray that service of this petition, with a subpœna, may be made upon Brightwood Bronze Foundry Company, as provided in the Acts of Congress relating to bankruptcy, and that it may be adjudged by the court to be a bankrupt within the purview of said acts.

Bay State Crucible Company, By James M. Westgate, Treasurer [Seal.]; The Charles C. Lewis Company, By Charles A. Bemis, Assistant Treasurer [Seal.]; American Saw & Manufacturing Company, [Seal], C. G. Davis, Treasurer, Petitioners. Ballard & Weston, Attorneys. Address 374 Main Street, Springfield, Mass.

[fol. 3] UNITED STATES OF AMERICA,
District of Massachusetts, ss:

Charles A. Bemis, Carl G. Davis, James M. Westgate, being treasurers and chief financial officers of three of the petitioners abovenamed, do hereby make solemn oath that the statements contained in the foregoing petition, subscribed by said petitioners, are true.

James M. Westgate, Charles A. Bemis, Carl G. Davis, Petitioners.

Before me, by Charles A. Bemis, this nineteenth day of October, 1920. Charles Thurston, Notary Public.

Before me, by Carl G. Davis, this eighteenth day of October, 1920. George A. Bacon, Notary Public. [Seal.]

Before me, by James M. Westgate, this thirtieth day of October, 1920. Charles R. Hodges, Notary Public. [Seal.]

ADJUDICATION OF BANKRUPTCY

At Boston, in said District, on the nineteenth day of November, A. D. 1920. Before the Honorable James M. Morton, Jr., judge of said court in bankruptcy, the petition of Bay State Crucible Co. et al., that Brightwood Bronze Foundry Company be adjudged a bankrupt, within the true intent and meaning of the Acts of Congress relating to bankruptcy, having been heard and duly considered, the said Brightwood Bronze Foundry Company is hereby declared and adjudged bankrupt accordingly.

Witness the Honorable James M. Morton, Jr., judge of said court, and the seal thereof, at Boston, in said District on the nineteenth day of November, A. D. 1920.

Mary E. Prendergast, Deputy Clerk. [Seal.]

[fol. 4] SCHEDULE A—STATEMENT OF ALL DEBTS OF BANKRUPT—Filed February 16, 1921, at 9 o'clock A. M.

Schedule A (1)

* * * * * * *

Schedule A (3)

Creditors Whose Claims are Unsecured

* * * * * * *

Nassau Smelting and Refining Works

W. 29 St., New York City; 1920, Springfield , Mass.

* * * * * * *

	Amount Dollars, cents
Merchandise	11,354.40
Total [carried forward]	46,630.73

* * * * * * *

IN UNITED STATES DISTRICT COURT

AGREEMENT AS TO CERTAIN FACTS—Filed July 5, 1922

In the above-entitled cause, it is agreed that the Brightwood Bronze Foundry Company made a general assignment for the benefit of its creditors to Henry Lasker, the bankrupt's attorney, on the tenth day of September, 1920.

That said Henry Lasker took possession of the assets and is still holding possession of the same.

That on February 12, 1921, the bankrupt made an offer of composition of twenty-five per cent (25%) cash, and the meeting to consider the same was held on February 25, 1921.

That at the date of the offer, the Nassau Smelting & Refining Works, Ltd., has not filed or offered for proof, its proof of claim, and had not filed its proof of claim for allowance, within a year of the date of adjudication, but that at the date of the petition to limit the amount of the composition, the claim of the Nassau Smelting & Refining Works, Ltd., had neither been allowed nor disallowed, but was offered for proof on or about the sixth day of April, 1922.

That the claims proved and allowed amount to $34,058.50.

[fol. 5] That a special meeting of creditors to elect a trustee was held March 17, 1922, and Harry M. Ehrlich was elected trustee but has never qualified.

That the Nassau Smelting & Refining Works, Ltd., had received due notice of all the proceedings in bankruptcy.

Jacobs & Jacobs, Attorneys for the Appellant. Henry Lasker, Attorneys for the Appellee. Harry M. Ehrlich, Attorney for Creditors.

IN UNITED STATES DISTRICT COURT

PETITION FOR ORDER IN RE COMPOSITION—Filed March 27, 1922

To the Honorable James M. Morton, Jr., Judge of the United States District Court:

Representing the bankrupt, through Jacob Magaziner, its treasurer, and sets forth that the date of adjudication in the above entitled matter was November 19, 1920; that many of the creditors have proved their claims within the time allowed by Sec. 57 (N) (of the Act to Establish a Uniform System of Bankruptcy, 1908, and amendments thereto) according to a schedule hereto annexed marked "A;" that many of the creditors, although properly scheduled, have failed to prove their claims seasonably which list of creditors is hereinafter set out in the schedule hereto annexed marked "B;" that the petitioner has made an offer in composition of 25 per cent cash, which offer has been accepted by a majority in amount and number of creditors as required by law; that the bankrupt is now required to deposit the funds necessary to complete said composition; that if the bankrupt is required to deposit funds in the amount called for by the schedules, including the claims proved seasonably and those which are not now provable, it will cause a great hardship on the bankrupt, and make necessary the abandonment of the composition proceedings.

Wherefore your petitioner prays;

That this court order such sum deposited, as shall be sufficient to [fol. 6] pay, in composition, only such claims as were seasonably proved, together with all reasonable expenses of administration.

Dated this twenty-fifth day of March, 1922, at Springfield, Mass.

Brightwood Bronze Foundry Company, By Jacob Magaziner, Its Treasurer.

Sworn to before me this twenty-fifth day of March, 1922. Harry M. Ehrlich, Notary Public. My commission expires November 10, 1927.

IN UNITED STATES DISTRICT COURT

ORDER ON PETITION AS TO NOTICE—March 27, 1922

On the twenty-seventh day of March, 1922, on reading the foregoing petition: It is ordered by the court, that a hearing be had upon the same on the sixth day of April, 1922, before said court, at

Boston, in said District, and that all known creditors and other persons in interest may appear at the said time and place, and show cause, if any they have, why the prayer of said petitioner should not be granted.

And it is further ordered by the court, That the clerk of said court shall send by mail to all known creditors, notices of said petition and this order, addressed to them at their places of residence as stated.

Witness the Honorable James M. Morton, Jr., judge of said court, and the seal thereof, at Boston, in said District, on the twenty-seventh day of March, 1922.

Mary E. Prendergast, Deputy Clerk.

I hereby certify that I have on this twenty-seventh day of March, 1922, sent by mail, franked, notices of the within order as therein directed.

Mary E. Prendergast, Deputy Clerk.

[fol. 7] To the foregoing order on petition as to notice is annexed a list of unsecured claims amounting to $34,058.50 which have been proved and allowed, marked "A," and a list of unsecured claims scheduled, not proved, marked "B," which are here omitted.

The claim of the Nassau Smelting & Refining Works, Ltd., was not listed among the proved and allowed claims, said claim not having been offered for proof until after the year had expired and which has not as yet been allowed or disallowed.

IN UNITED STATES DISTRICT COURT

APPEARANCE OF NASSAU SMELTING & REFINING WORKS, LTD., OBJECTING TO PETITION—Filed April 1, 1922

Nassau Smelting & Refining Works, Ltd., a creditor in said matter, appears and objects to the said petition that deposit under composition be limited to only those creditors whose claims have been proved and allowed.

By its Attorneys, Jacobs & Jacobs, 45 Milk Street, Boston.

IN UNITED STATES DISTRICT COURT

ORDER GRANTING PETITION AS TO DEPOSIT—May 8, 1922

At Boston, in said District, on the eighth day of May, A. D. 1922, upon the petition of the bankrupt that the deposit under composition offer be sufficient only for those creditors whose claims have been proved and allowed; now therefore, upon the objections thereto filed by Nassau Company, creditor, and after hearing arguments of Joseph B. Jacobs, Esq., of counsel for the Nassau Company, and of Harry M. Ehrlich Esq., counsel for the bankrupt, and after due consideration of the same:

It is hereby ordered and decreed that said petition be and it hereby is granted.

Witness the Honorable James M. Morton, Jr., judge of said court, and the seal thereof, this eighth day of May, A. D. 1922.

Mary E. Prendergast, Deputy Clerk. [Seal.]

[fol. 8] IN UNITED STATES DISTRICT COURT

MEMORANDUM OF DECISION

May 5, 1922

MORTON, J.:

This is a composition case; and the question is whether the bankrupt must deposit enough to pay the offered percentage on all scheduled claims, or only on claims which were proved and allowed within one year after adjudication. The adjudication was on November 19, 1920; the composition offer was filed February 12, 1921.

The decision turns on whether section 57n, which provides that "Claims shall not be proved against a bankrupt estate subsequent to one year after adjudication," applies to composition proceedings. The exact point was fully and carefully considered by Judge Lowell in In re Lane, 125 F. R. 772, and by Judge Dodge in In re French, 181 F. R. 583, and In re Blond, 188 F. R. 452, in all of which cases it was held that section 57n did apply. In the case last mentioned Judge Dodge said, "If the bankrupt had asked to be excused from depositing a dividend on this claim, on the ground that it had been barred, I do not see how his request could have been refused. This creditor would have had no standing to oppose it." The same conclusion was more recently reached in an able and careful opinion by Judge Sibley in In re Bickmore Shoe Company, 263 F. R. 926.

In In re Atlantic Const. Co., 228 F. R. 571, Judge Learned Hand took a different view and differentiated between compositions in which the offer is made within a year after adjudication and those in which it is made more than a year after adjudication, and distinguished In re French on that ground. But if section 57n applies to composition proceedings at all, I doubt whether the discrimination suggested, which is not found in the statute, can be set up by the court. As Judge Sibley points out, section 12 which relates to composition explicitly provides for the proof and allowance of claims, and only claims which have been proved and allowed are entitled to share. This being so, it seems to me, as it did to him, that where an offer is made after adjudication section 57n is applicable. Even [fol. 9] if I thought otherwise, I ought to follow the decision referred to in this district.

The claim of the Nassau Company need not be provided for in the deposit.

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL OF NASSAU SMELTING & REFINING WORKS, LTD., AND ORDER ALLOWING SAME—Filed May 18, 1922

To the Honorable James M. Morton, Jr., District Judge:

And now comes the Nassau Smelting & Refining Works, Ltd., and feeling itself aggrieved by the order entered in the above entitled case on the eighth day of May, 1922, does hereby appeal from said order to the Circuit Court of Appeals for the First Circuit, for the reasons set forth in the assignment of errors filed herewith, and it prays that this appeal be allowed and that citation be issued as provided by law, and that a transcript of the record proceedings and the document upon which said order was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the First Circuit, sitting at Boston, under the rules of such court in such cases made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of it be made.

Nassau Smelting and Refining Works, Ltd., By Its Attorneys,
Jacobs & Jacobs.

Appeal allowed May 18, 1922. J. M. Morton, U. S. District Judge.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed May 18, 1922

And now comes the Nassau Smelting & Refining Works, Ltd., a creditor of the above entitled bankrupt, and files the following assignment of errors upon which it will rely upon its prosecution of the appeal in the above entitled cause, from the order made by this Honorable Court on the eighth day of May, 1922.

[fol. 10] I. That the United States District Court for the District of Massachusetts erred in granting the motion of the bankrupt that it be allowed to deposit for its composition, only a sum sufficient to pay the composition dividend on claims proved and allowed.

II. That the United States District Court for the District of Massachusetts erred in not requiring the bankrupt to deposit a sum sufficient to pay the composition dividend on the total amount of the claims scheduled.

Wherefore, the appellant prays that said order be reversed.

Jacob & Jacobs, Attorneys for Appellant.

In United States District Court

Bond on Appeal—Filed and approved May 18, 1922. [Morton, J.; for $250.00; omitted in printing]

[fol. 11] In United States District Court

Præcipe for Transcript—Filed July 5, 1922

To the Clerk of the United States District Court for the District of Massachusetts:

You are hereby requested to make a transcript of the record to be filed in the United States Circuit Court of Appeals for the First Circuit, pursuant to an appeal allowed in the above-entitled cause, and to include in said transcript the following:

Involuntary petition in bankruptcy.

Adjudication in bankruptcy.

The following portions of the schedules:

"Unsecured liabilities $46,630.73, including the Nassau Smelting & Refining Works, Ltd., scheduled at $11,354.40."

Statement in the record that on September 10, 1920, the Brightwood Bronze Foundry Company made an assignment to Henry Lasker, who received possession of the assets on that date, and is now holding the same.

Petition for order to limit amount of composition, entitled "Petition for Order in re Composition."

Order on the petition as to notice, etc., omitting list of claims proved and allowed, but stating that claims in the amount of $34,058.50 were proved and allowed, but said list did not include the claim of the Nassau Smelting & Refining Works, Ltd., which claim was not offered for proof until after the year had expired, but which claim has not, at the present time, been allowed or disallowed as yet.

[fol. 12] A meeting for the election of trustee was held on the seventeenth day of March, 1922, and Harry M. Ehrlich was elected trustee, but has never qualified.

The offer of composition was filed February 12, 1921, and the meeting to consider same was held February 25, 1921.

Opinion of the court.

Order of May 8th.

Appearance of the Nassau Smelting & Refining Works, Ltd., objecting to the petition to limit composition deposit.

Jacobs & Jacobs, Attorneys for Appellant.

Assented to.

Henry Lasker, Attorney for Brightwood Bronze Foundry Company. Harry M. Ehrlich, Attorney for Creditors.

In United States District Court

Citation and Service

United States of America, ss:

The President of the United States to the Brightwood Bronze Foundry Company, a Bankrupt, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the sixteenth day of June next, pursuant to an appeal duly obtained from a decree of the District Court of the United States for the District of Massachusetts, wherein the Nassau Smelting & Refining Works, Ltd., a creditor, is appellant and you are appellee, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice not be done to the parties in that behalf.

Witness, the Honorable James M. Morton, Judge of the District Court of the United States for the District of Massachusetts, this [fol. 13] eighteenth day of May, in the year of our Lord one thousand nine hundred and twenty-two.

James M. Morton, Jr., United States District Judge.

Acknowledgements of Service of Citation on Appeal

June 8, 1922.

I hereby accept service in behalf of the bankrupt.

Henry M. Ehrlich.

June 8, 1922.

I hereby accept service in behalf of the bankrupt.

Henry Lasker.

In United States District Court

Clerk's Certificate

United States of America,
District of Massachusetts, ss:

I, John E. Gilman, Jr., Deputy Clerk of the District Court of the United States, within and for the District of Massachusetts, and during the temporary absence of the clerk in charge of the affairs of the clerk's office of said court, and the custodian of its files and records, do hereby certify that the foregoing are true copies of the portions of the record which the parties have agreed shall constitute the appeal record of the Nassau Smelting & Refining Works, Ltd., a creditor, from the order entered May 8, 1922, in the cause entitled, No. 28,216, in bankruptcy, in the matter of Brightwood Bronze Foundry Company, Bankrupt, together with the original Citation and the Acknowledgments of Service thereon.

And I further certify that the adjudication of bankruptcy in said matter was made on the nineteenth day of November, A. D. 1920.

In testimony whereof I hereunto set my hand and affix the seal [fol. 14] of said court, at Boston, in said District, this first day of August, A. D. 1922.

John E. Gilman, Jr., Deputy Clerk. (Seal.)

In United States District Court

Order of Enlargement of Time for Docketing Case and Filing Record

June 13, 1922

Morton, J.:

For good cause shown, it is ordered that the time for docketing this case and filing the record thereof in the United States Circuit Court of Appeals for the First Circuit be enlarged to and including Tuesday, August 1, 1922.

By the Court.

James S. Allen, Clerk.

[fol. 15] In U. S. Circuit Court of Appeals

Clerk's Certificate

I, Arthur I. Charron, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the printed pages numbered 1 to 14, inclusive, hereto prefixed, contain and are a true copy of the record in the cause in said court numbered and entitled: No. 1578, Nassau Smelting & Refining Works, Ltd., Creditor, Appellant, v. Brightwood Bronze Foundry Company, Bankrupt, Appellee.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this twenty-eighth day of February, A. D. 1923.

Arthur I. Charron, Clerk. [Seal of the United States Circuit Court of Appeals, First Circuit.]

[fol. 16] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, October Term, 1921

[Title omitted]

PETITION OF NASSAU SMELTING & REFINING WORKS, LTD., TO REVISE IN MATTER OF LAW THE PROCEEDINGS OF THE DISTRICT COURT—Filed in Circuit Court of Appeals August 3, 1922

To the Honorable the Judges of the Circuit Court of Appeals for the First Circuit:

Your petitioner, the Nassau Smelting & Refining Works, Ltd., respectfully shows:

That it is a corporation duly organized by law, with a usual and principal place of business in the City, County and State of New York, and is a creditor in the amount of $11,356.44 of the Brightwood Bronze Foundry Company, which was adjudged bankrupt by the District Court of the United States for the District of Massachusetts, on the nineteenth day of November, 1920, upon an involuntary petition in bankruptcy filed on the fifth day of November, 1920.

That previous to the filing of the involuntary petition in bankruptcy, the bankrupt made a general assignment for the benefit of its creditors on the tenth day of September, 1920, to one Henry Lasker, the bankrupt's attorney, and said Henry Lasker, down to [fol. 17] the date of the filing of this petition, has remained in possession of the assets of the bankrupt.

That after the aforesaid adjudication in bankruptcy, the bankrupt made an offer of composition on February 12, 1921, of twenty-five per cent (25%) cash, and a meeting to consider the composition was held on February 25, 1921.

That the fund necessary to put through said composition has not been deposited with the clerk of the United States District Court as is required by law.

That on or about the twenty-seventh day of March, 1922, the bankrupt filed a petition to be permitted to deposit, to meet the composition offer, a fund sufficient only to pay those creditors whose claims had hitherto been proved and allowed.

That your petitioner appeared and objected to the aforesaid petition of the bankrupt.

That your petitioner's claim was not filed or allowed within the year of the date of the adjudication in bankruptcy, but your petitioner has since filed its claim and seeks to have the same allowed in order to share in the composition dividend.

That your petitioner claims the right to have sufficient funds deposited to pay the composition dividend on its claim.

That the matter came on for hearing in the United States District Court for the District of Massachusetts, on said petition of the bankrupt and on your petitioner's objection thereto, and the United States

District Court handed down an opinion on the fifth day of May, 1922, a copy of which is hereto annexed, marked "A," and on the eighth day of May, 1922, entered an order, a copy of which is hereto annexed, marked "B," granting the motion of the bankrupt, and giving permission to the bankrupt to deposit only such sums as were necessary to pay the composition dividend on claims proved and allowed.

And your petitioner further says that the adverse party against whom relief is sought is the Brightwood Bronze Foundry Company, who were represented in the court below by Henry Lasker.

Wherefore, your petitioner, feeling aggrieved because of said order, asks that the same be revised in matter of law, by this Honorable [fol. 18] Court, as provided in Section 24 B of the Bankruptcy Act of 1898, and the rules and practice in such cases provided.

Nassau Smelting & Refining Works, Ltd., By its Attorney, Joseph B. Jacobs.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

I, Joseph B. Jacobs, duly authorized attorney for the Nassau Smelting & Refining Works, Ltd., do hereby make solemn oath that the statements herein contained are true, according to the best of my knowledge, information and belief.

Joseph B. Jacobs.

Subscribed and sworn to before me this third day of July, 1922. Sarah A. Corrigan, Notary Public.

DISTRICT COURT OF THE UNITED STATES, DISTRICT OF MASSACHUSETTS

In Bankruptcy. No. 28216

In re BRIGHTWOOD BRONZE FOUNDRY COMPANY, Bankrupt

EXHIBIT "A" TO PETITION TO REVISE

Memorandum of Decision

May 5, 1922

MORTON, J.:

This is a composition case; and the question is whether the bankrupt must deposit enough to pay the offered percentage on all scheduled claims, or only on claims which were proved and allowed within one year after adjudication. The adjudication was on November 19, 1920; the composition offer was filed February 12, 1921.

The decision turns on whether Section 57n, which provides that "Claims shall not be proved against a bankrupt estate subsequent

to one year after adjudication," applies to composition proceedings. The exact point was fully and carefully considered by Judge Lowell in In re Lane, 125 F. R. 772, and by Judge Dodge in In re [fol. 19] French, 181 F. R. 583, and In re Blond, 188 F. R. 452, in all of which cases it was held that Section 57n did apply. In the case last mentioned Judge Dodge said: "If the bankrupt had asked to be excused from depositing a dividend on this claim, on the ground that it had been barred, I do not see how his request could have been refused. This creditor would have had no standing to oppose it." The same conclusion was more recently reached in an able and careful opinion by Judge Sibley in In re Bickmore Shoe Co., 263 F. R. 926.

In In re Atlantic Const. Co., 228 F. R. 571, Judge Learned Hand took a different view and differentiated between compositions in which the offer is made within a year after adjudication and those in which it is made more than a year after adjudication, and distinguished In re French on that ground. But if section 57n applies to composition proceedings at all, I doubt whether the discrimination suggested, which is not found in the statute, can be set up by the Court. As Judge Sibley points out, section 12 which relates to composition explicitly provides for the proof and allowance of claims, and only claims which have been proved and allowed are entitled to share. This being so, it seems to me, as it did to him, that where an offer is made after adjudication section 57n is applicable. Even if I thought otherwise, I ought to follow the decisions referred to in this District.

The claim of the Nassau Company need not be provided for in the deposit.

District Court of the United States, District of Massachusetts

No. 28216. In Bankruptcy

In re Brightwood Bronze Foundry Co., Bankrupt

Exhibit "B" to Petition to Revise

Order Granting Petition as to Deposit

May 8, 1922

At Boston on the eighth day of May, A. D., 1922, upon the petition of the bankrupt that the deposit under composition offer be [fol. 20] sufficient only for those creditors whose claims have been proved and allowed; now, therefore, upon the objections thereto filed by Nassau Company, creditor, and after hearing argument of Joseph B. Jacobs, Esq., of counsel for Nassau Company, and of Harry M. Erlich, Esq., counsel for the bankrupt, and after due consideration of the same: It is hereby Ordered and Decreed that said petition be and it hereby is granted.

Witness the Honorable James M. Morton, Jr., Judge of said Court, and the seal thereof, this eighth day of May, A. D. 1922.

Mary E. Prendergast, Deputy Clerk. (Seal.)

IN U. S. CIRCUIT COURT OF APPEALS

STIPULATION AS TO TRANSCRIPT—Filed September 18, 1922

It is agreed that the transcript of the record on the appeal in case number 1578, Nassau Smelting & Refining Works, Ltd., Creditor, Appellant, v. Brightwood Bronze Foundry Company, Bankrupt, Appellee, may be used in the presentation and argument of the petition to superintend and revise brought by the Nassau Smelting & Refining Works, Ltd., against the Brightwood Bronze Foundry Company, reserving to the appellee the right to move that the appellant elect to proceed on either the appeal or petition to superintend and revise.

Jacobs & Jacobs, Attorneys for Petitioner. Henry Lasker, Attorney for Respondent.

[fol. 21] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, OCTOBER TERM, 1922

[Title omitted]

Appeal from, and Petition to Revise, the District Court of the United States for the District of Massachusetts

Before Bingham, Johnson, and Anderson, JJ.

OPINION OF THE COURT—January 4, 1923

BINGHAM, J.:

This is a petition under Section 24b of the bankruptcy act of 1898 to revise in matter of law proceedings of the District Court for Massachusetts.

An involuntary petition in bankruptcy was filed in the District Court against the Brightwood Bronze Foundry Company on November 5, 1920, and on November 19, 1920, it was adjudicated a bankrupt. The bankrupt duly filed schedules of its property and a list [fol. 22] of its creditors as required by Sec. 7, clause 8, of the act, and included in its schedules the present petitioner, the Nassau Smelting & Refining Works, as a creditor in the sum of $11,354.40. On February 12, 1921, and before the expiration of a year from the date of adjudication, the bankrupt made an offer of composition to its creditors and a meeting of creditors to consider the offer was held February 25, 1921. On March 27, 1922, the Nassau Smelting & Refining Works, having failed to prove and file its claim for $11,354.40 within a year from adjudication, the bankrupt, the Foundry

Company, petitioned the court to be permitted to deposit, to meet the composition offer, a fund sufficient to pay creditors whose claims had been proved and allowed within a year from adjudication, together with all reasonable expenses of administration. Notice of the petition having been given, the Nassau Smelting & Refining Works appeared and objected to the granting of the petition and asked leave to file its proof of claim. The petition to limit the amount of the deposit was granted and the Nassau Smelting & Refining Works brought this proceeding to revise, and also appealed from the order.

It is conceded that the Nassau Smelting & Refining Works received due notice of all proceedings in bankruptcy and it does not appear that its failure to have its claim proved and filed was due to any misconduct of the bankrupt; the sole question is whether the limitation placed upon the proof and filing of claims by Sec. 57n of the bankruptcy act applies to composition proceedings under that act.

Sec. 57n, so far as here material, reads as follows:

"Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication."

There can be no question but that in the ordinary bankruptcy case the claim of a creditor, although included in the bankrupt's schedules, in the absence of fraud practised by the bankrupt, must be proved and filed within one year from the date of adjudication, and the question is whether, under the composition provisions of the act a creditor's right to share in a composition offer is likewise limited. [fol. 23] By Sec. 12a a bankrupt may offer terms of composition to his creditors after he has been examined in open court or at a meeting of his creditors, provided he has filed schedules of his property and a list of his creditors; and by subdivision b of the same section "an application for the confirmation of a composition may be filed in the court of bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims, and the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge." By Sec. 12c, "upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided." By Sec. 14c, "the confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge." Sec. 17 defines the debts not affected by a discharge.

Sec. 57, and subdivisions a to m inclusive, provide the method by which claims may be proved and allowed and are applicable whether the bankrupt is seeking a discharge through composition or through the administration and distribution of his estate in the

ordinary course, and the method of proof being the same it is difficult to see how Congress could have intended that the limitation provided by subdivision n of that section, which undoubtedly applies to the proof and allowance of claims under Sec. 57 when the estate is administered in the ordinary course, should not also apply to composition, where there has been an adjudication in bankruptcy.

In the construction and application of these provisions in the Massachusetts District and elsewhere through a long series of years, a creditor, in the absence of fraud practiced upon him, has not been permitted to prove and file a claim after the expiration of a year [fol. 24] from adjudication and participate in an offer of composition, and no sufficient reason has been suggested and none occurs to us for reaching a different conclusion. See In re Lane (D. C. Mass.), 125 Fed. 772; In re Blond (D. C. Mass.), 188 Fed. 452; In re French (D. C. Mass.), 181 Fed. 583; In re Brown (D. C. Col.), 123 Fed. 336; In re Bickmore Shoe Co. (D. C. Ga.), 263 Fed. 926.

In In re Lane, supra, decided by the District Court of Massachusetts in 1902, appeared that the petitioner had failed through inadvertence to prove his claim within a year of adjudication; that the bankrupt had offered a composition which had been duly accepted and a sufficient deposit made; that some of the creditors had failed to claim their dividends; and that the petitioning creditor sought to prove his claim and obtain payment from the surplus left in the hands of the court. It was held that the petition to be allowed to prove the claim should be denied. In re Lane was cited with approval by the Supreme Court in Cumberland Glass Co. v. De Witt, 237 U. S. 447, 453, (1915), and, such being the case, we regard it as indicating that that court considered Sec. 57n applicable to proof of claims in composition.

Then again, as Sec. 12a, as amended in 1910, provides that: "A bankrupt may offer, either before or after adjudication, terms of composition to his creditors, etc.," it is contended that a composition may be had without adjudication and if a composition were had without adjudication there would be no time fixed from which the year would run to bar the proof of claims under Sec. 57n. But notwithstanding a bankrupt may offer composition before adjudication, it does not follow that adjudication may not thereafter be had for the purpose of barring claims. The act, as a whole, contemplates, and the language used in Section 12 implies that adjudication may and will be had if it is desired to bar the proof of claims or if composition has for any reason failed and the estate is to be administered in the ordinary course (Sec. 12e). Composition is a proceeding in bankruptcy (Wilmot v. Mudge, 103 U. S. 217), and, as the proof of a claim may be barred where the estate is administered in the ordinary [fol. 25] course, there is no reason why it may not be barred when composition is had by taking the necessary steps to fix the time from which the statute may run.

The appeal is dismissed with costs to the appellee. In the proceeding to superintend and revise it is ordered that the decree of the District Court be affirmed with costs to the Brightwood Bronze Foundry Company.

In U. S. Circuit Court of Appeals

Dissenting Opinion

Anderson, J. (dissenting):

I cannot concur. I think §57n has no application to composition proceedings. No one can contend that it applies to composition before adjudication. In recent years more than two-thirds of the composition cases in this district have been without adjudication. In such cases there is no adjudication from which to date the year, nor any bankrupt estate; the debtor is never divested of his estate under §70a, and, on confirmation, it never revests under §70f. As matter of literal construction, the words, "Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication," clearly cannot be applied to proceedings which lack both "adjudication" and "bankrupt estate."

But if §57n cannot apply, in cases of composition before adjudication, it ought not to be arbitrarily applied in cases of composition after adjudication. Obviously, the rights of scheduled creditors in composition cases should be the same whether composition precede or follow adjudication.

If, turning from a literal application of the words of §57n, we consider the reason thereof, the conclusion is the same. In ordinary bankruptcy the bankrupt has no interest in his estate. It belongs entirely to his creditors. In re Morton, 118 Fed. 908. In such cases, every creditor is adverse to every other creditor. The fewer the creditors the larger the dividend. §57n is therefore a statute of limitation in favor of creditors in order that the distribution of their estate may be speeded. In re Lane, 125 Fed. 772, 773. But in composition, there are only two parties,—the debtor on one side, and the creditors as a class on the other side. The debtor, instead [fol. 26] of giving up his estate for distribution by a trustee, seeks to bargain with his creditors and invoke the composition machinery of the act in order to coerce a possibly recalcitrant minority.

I think that every creditor scheduled as such, and whether he proves or not, has a right to avail of the debtor's offer "to his creditors"; that the debtor is estopped to deny the right of those he has scheduled as creditors to have the benefit of his offer to his creditors. Scheduled creditors, whether proving or not, have rights against the debtor. Cf. Haley v. Pope, 206 Fed. 269. In the present, as in the usual case, the offer was, as required by §12, to his creditors.

Composition first came into our Bankruptcy Law in 1874, and was modelled on the English Bankruptcy Act of 1869. In re Scott, Fed. Cas. 12,519; Cumberland Glass Co. v. De Witt, 237 U. S. 447, 453; In re Holmes, 15 Blatch. 170. But, while the Bankruptcy Act provides machinery to facilitate this bargaining between debtor, on the one side, and creditors as a class on the other side, composition "is in some respects outside of the Act," by Mr. Justice Day in Cumberland Glass Co. v. De Witt, 237 U. S. 447, 453. In re Lane, 125 Fed. 772. In underlying theory, composition is like an assignment

for the benefit of creditors, which operates as an extra-judicial compounding with creditors. Compare R. L. Mass. c. 203 §41. The debtor must file a schedule of his creditors, and may then, either before or after adjudication, make an express offer to pay his creditors, in cash or securities, a named percentage of their claims. It is not an offer to buy his estate from a trustee; for in the usual case, since the amendment of 1910, there is no trustee. He must offer to pay, and deposit the amount necessary to pay, the named percentage to all his scheduled creditors. Compare In re Harvey, 144 Fed. 901. Creditors not scheduled, or without notice or actual knowledge of the proceedings in bankruptcy, are not affected by a discharge, — or a confirmation of composition, the equivalent of a discharge, §17 (3).

The fact that §12 provides for the allowance of claims in composi- [fol. 27] tion proceedings, ought not to mislead us as to the application of §57n. Of course when, after adjudication, a composition offer is made and claims are presented for allowance, the situation created seems like that arising in ordinary bankruptcy. But, on analysis, it is apparent that a meeting of creditors and the allowance of claims, either after or before adjudication, are merely conditions precedent for determining whether the majority in number and amount of the creditors proving accept the debtor's composition offer. Such proceedings are the necessary means of providing for creditor determination, for or against ordinary bankruptcy. In ordinary bankruptcy, proof of claims is requisite in order to determine the rights of creditors, inter sese, in an estate in which the debtor has no interest whatever. But in composition cases, proof of claims is necessary in order to create the proper voting constituency to act on the debtor's offer to compound with his creditors in a bargain essentially outside of real bankruptcy. It is like registering in order to vote at a political election. Compare In re Atlantic Construction Co., 228 Fed. 571; In re Fox, 6 Am. B. R. 525.

Non-proving creditors lose their right to vote,—they should not lose their right to receive what their debtor has offered them. The statute, §12e, does not require that the consideration be paid to proving creditors only. "The consideration shall be distributed as the judge shall direct." No reason is suggested why every scheduled creditor, whether proving or not, and every proving creditor, whether scheduled or not, should not receive his due proportion of the consideration. So proceeding, the consideration deposited is all distributed to creditors scheduled or proving, and "the case dismissed," §12e. There is no use for any statute of limitations. The debtor, by scheduling creditors, puts them in court for the purpose of receiving what he offers in composition; any non-scheduled creditors who prove are also thus in court.

If we turn to the decided cases, we get little or no help. No Court of Appeals has ever held §57n applicable in composition proceedings. [fol. 28] Judge Lowell's decision in Re Lane, 125 Fed. 772, was in 1902, long before, under the amendment of 1910, composition without adjudication was authorized.

I can find nothing in the opinion of the Supreme Court in the Cumberland Glass case, 237 U. S. 447, 453, indicating that that court even considered the question now before this court. In that case, the court was dealing, in a composition proceeding, with set-off under under §68a, dividing, five to four, on a question entirely remote from the one now before us. In the majority opinion, Mr. Justice Day said: "The nature of composition proceedings is nowhere better stated than by Judge Lowell in In re Lane, 125 Fed. 771, 773." * * * The justice then quotes at length from Judge Lowell's opinion; but ends his quotation with Judge Lowell's discussion of the general nature of composition proceedings, omitting the sentences containing Judge Lowell's conclusion that §57n might, in composition cases, be invoked by a debtor against a scheduled creditor who had not proved within the year. This omission is inconsistent with the view that the Supreme Court was thus, by indirection, approving a doctrine entirely foreign to the question then before that court. I think Judge Lowell's conclusion inconsistent with his own reasoning.

The view of the majority, that even after the amendment of 1910, "It does not follow that adjudication may not thereafter be had for the purpose of barring claims," does not seem to me tenable. The purpose of the amendment of 1910 was to authorize composition without adjudication. By necessary implication it excludes adjudication as a necessary element in composition proceedings.

In no district court decision subsequent to the Act of 1910 do we find any satisfactory discussion of what is now the typical situation,—composition without adjudication. See In re Englanders, Inc., 267 Fed. 1012; Haley v. Pope, 206 Fed. 266; In re French, 181 Fed. 583; In re Bickmore Shoe Co., 263 Fed. 926.

Judge Learned Hand's views so far as expressed in Re Atlantic Construction Co., 228 Fed. Rep. 571, seem nearly, if not quite, in accord with mine. He says: "§57n seems to me to have no appli-[fol. 29] cation whatever to the situation; it concerns only proving claims against the bankrupt estate, and that is quite irrelevant to an offer to the bankrupt's creditors." 228 Fed. 572.

I do not think it can be held that §57n applied to composition cases before the amendment of 1910, and was by that amendment repealed pro tanto by implication. The situation seems rather to be that, before that amendment, the real nature of composition proceedings was not seen in clear perspective.

But the amendment of 1910 brings out in bold relief the real nature of composition proceedings. In essence now a composition before adjudication is a prevention of bankruptcy, a method of avoiding bankruptcy. It contrasts with real bankruptcy,—for the debtor, instead of asking to have, or submitting to having, his estate taken from him for the benefit of his creditors, seeks to bargain with his creditors, invoking the composition provisions of the Act merely for the purpose of coercing an objecting minority.

I find it impossible to see how a debtor who has offered to pay every one of his scheduled creditors a named percentage,—provided a majority in number and amount of those proving assent, and

the court confirms it,—can thereafter be heard to say that his offer applies only to those who have proved. Apart from the technical aspects of this question, it is clear that such construction increases the opportunity for fraud, already sufficient under the composition provisions of the Act. In the case at bar, the debtor offered on February 12, 1921, 25 per cent to a list of scheduled creditors whose claims aggregated $46,630.73. But in some fashion,—whether as a result of the debtor's strategy or not does not appear, proceedings were delayed until March 27, 1922, when the debtor filed a petition for permission to deposit the requisite amount. While the case lay dormant more than thirteen months, creditors whose claims aggregated $12,562.23 neglected to prove their claims. And the debtor now seeks to invoke §57n,—intended to speed the distribution of a real bankruptcy estate,—in order to cut off more than one-quarter [fol. 30] of his own admitted creditors from receiving the 25 per cent offered. True, there is nothing in this record indicating fraud or lack of notice. But the case illustrates the additional opportunities for fraud afforded by misapplying a statute of limitations, intended for creditors only, to a situation where it may redound greatly to the benefit of a debtor.

My views are, in essence, those stated by Referee Remington in 1901—In re Fox, 6 A. B. R. 525, 530:

"It is even doubtful whether the year's limitation for proving claims 'against bankrupt estates', laid down in section 57n, has any application to composition cases; no particular reason exists for requiring creditors to prove their claims at all, since the bankrupt is the only one who is interested in contesting them, and he is estopped by his schedules, except in cases of mistake or fraud. There being no necessity for proof of claims by creditors, what is the applicability of a limitation for proving claims?"

I am aware that for many years the practice has been to require proofs in composition cases, and that some District Courts have applied the limitation of §57n. But I find nothing in the Act, or in any decision binding on us, warranting this practice. I believe it to be inconsistent with the underlying theory of composition, and that it frequently causes, as in this case, results wholly unjust.

[fol. 31] On October 5, 1922, this cause came on to be heard, and was fully heard by the court, Honorable George H. Bingham, Honorable Charles F. Johnson and Honorable George W. Anderson, Circuit Judges, sitting.

Thereafter, to wit, on the fourth day of January, A. D. 1923, the opinion of the court (page 7) was announced, a dissenting opinion by Anderson, J. (page 11), was filed and the following Final Decree was entered:

IN U. S. CIRCUIT COURT OF APPEALS

FINAL DECREE

January 4, 1923

This case came on to be heard October 5, 1922, upon a petition to revise in matter of law the proceedings of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now, to wit, January 4, 1923, here ordered, adjudged and decreed as follows: The Judgment of the District Court is affirmed with costs to the Brightwood Bronze Foundry Company.

By the Court.

Arthur I. Charron, Clerk.

Thereafter, to wit, on the twenty-eighth day of February, A. D. 1923, the following Motion for Stay of Mandate was filed:—

IN U. S. CIRCUIT COURT OF APPEALS

MOTION FOR STAY OF MANDATE—Filed February 28, 1923

And now comes the Nassau Smelting & Refining Works, Ltd., petitioner, in the above-entitled case, and says that it intends to file a petition for certiorari in the United States Supreme Court, and moves that the mandate be stayed until further order of the court.

Nassau Smelting & Refining Works, Ltd., By Its Attorney,
Joseph B. Jacobs.

On the same day, to wit, on the twenty-eighth day of February, A. D. 1923, the following Order of Court was entered:

[fol. 32] IN U. S. CIRCUIT COURT OF APPEALS

ORDER STAYING MANDATE

February 28, 1923

Upon motion of petitioner, setting forth that it proposes to file a petition in the Supreme Court for a writ of certiorari, It is ordered that the mandate in this case be, and the same hereby is, stayed until further order of court, upon the condition that said petition is duly filed and presented within the time prescribed by the rules and practice of the Supreme Court of the United States.

By the Court.

Arthur I. Charron, Clerk.

In U. S. Circuit Court of Appeals

Clerk's Certificate

I, Arthur I. Charron, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the printed pages numbered 1 to 18, inclusive, hereto prefixed, contain and are a true copy of the record and all proceedings to and including March 3, 1923, in the cause in said court numbered and entitled, No. 1579 (Original), Nassau Smelting & Refining Works, Ltd., Petitioner; In the Matter of Brightwood Bronze Foundry Company, Bankrupt.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this third day of March, A. D. 1923.

Arthur I. Charron, Clerk. [Seal of the United States Circuit Court of Appeals, First Circuit.]

[fol. 33] Writ of Certiorari and Return—Filed June 30, 1923

United States of America, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the First Circuit Greeting:

Being informed that there is now pending before you a suit in which Nassau Smelting & Refining Works, Limited, is appellant, and Brightwood Bronze Foundry Company, Bankrupt, is appellee, No. 1578, October Term, 1921, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the District of Massachusetts, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, [fol. 34] do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the fourteenth day of June, in the year of our Lord one thousand nine hundred and twenty-three.

Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

[fol. 35] United States Circuit Court of Appeals for the First Circuit

Return on Writ of Certiorari

And now here the Judges of the United States Circuit Court of Appeals for the First Circuit make return to this writ by annexing hereto and sending herewith a stipulation between counsel for the respective parties in the cause in the Supreme Court of the United States wherein this writ of certiorari issued that the certified copy of the record heretofore filed in the Supreme Court of the United States shall constitute the return to the writ of certiorari issued therein.

In testimony whereof, I, Arthur I. Charron, Clerk of said United States Circuit Court of Appeals for the First Circuit, hereto set my hand and affix the seal of said court, at Boston, in said First Circuit, this twenty-ninth day of June, A. D. 1922.

Arthur I. Charron, Clerk. [Seal of United States Circuit Court of Appeals, First Circuit.]

[fol. 36] United States Circuit Court of Appeals for the First Circuit, October Term, 1922

[Title omitted]

Stipulation

In the above entitled case, it is agreed that the record heretofore filed in the Supreme Court of the United States in support of the petition for certiorari may be taken as a return on the writ of certiorari.

Joseph B. Jacobs, Jacobs & Jacobs, Attorneys for Petitioner. Harry M. Ehrlich, Attorney for Respondent. Henry Lasker, Attorney for Respondent.

Dated this 21st day of June, 1923.

A true copy.

Attest: Arthur I. Charron, Clerk. [Seal of United States Circuit Court of Appeals, First Circuit.]

[fol. 37] [File endorsement omitted.]

[fol. 38] [File endorsement omitted.]